

OCT 20 1976

No. 76-319

MICHAEL RODAN, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALBERT P. MICKUNAS, PETITIONER

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

ROBERT H. BORK,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-319

ALBERT P. MICKUNAS, PETITIONER

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

Petitioner contends that the court of appeals erred in dismissing his appeal for failure to prosecute.

1. In 1972, petitioner filed with the Department of the Interior an offer to lease public lands located within one mile of the Naval Petroleum Reserve No. 1 (Elk Hills), in Kern County, California, for the extraction of oil and gas. On December 8, 1972, the Office of the Bureau of Land Management rejected the offer, stating that "[b]ased on geological information presently available relating to the area under consideration, it is not possible to state that operations under such a lease will not adversely affect the adjacent Naval Petroleum Reserves through drainage from productive oil and gas horizons." The Bureau noted that "any action which will increase the likelihood of drainage from the deposits believed to exist in the formations underlying the Reserves [would

be] inconsistent with the laws requiring the maintenance of the Reserves for production in an emergency, 43 CFR 3101.1-1." This decision was affirmed on August 22, 1973, by the Interior Board of Land Appeals (12 IBLA 275), which denied a petition for reconsideration on November 27, 1973.

Seven months later, on June 28, 1974, petitioner instituted this action in the United States District Court for the Central District of California to challenge the administrative determination. On September 30, 1974, the court granted the government's motion to dismiss the complaint on the ground that the action was barred by the 90-day limitation period of 30 U.S.C. 226-2 (Pet. App. 5).¹ Petitioner filed a timely notice of appeal from this judgment on November 27, 1974, and designated the record on appeal. The designation made no reference to the eight-page reporter's transcript of the proceedings held on September 30, 1974. On December 5, 1974, the government counter-designated the record on appeal, requesting inclusion of the September 30 transcript. On April 11, 1975, the district court forwarded the record, including the transcript, to the clerk of the court of appeals, and on December 12, 1975, following delays caused by petitioner's failure to pay docketing fees properly or to move for an extension of time in which to file the record, the court of appeals forwarded copies of the record, excluding the transcript, to the parties.²

¹Section 42 of the Mineral Leasing Act, as added, 74 Stat. 790, 30 U.S.C. 226-2, provides: "No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter."

²Rule 4(f) of the Rules of the United States Court of Appeals for the Ninth Circuit provides that the transcript of proceedings is not included as part of the duplicated record transmitted to the parties and must be obtained from the reporter.

Following the docketing of the record, petitioner neither filed his brief on appeal within the 40-day limit of Rule 31(a), Fed. R. App. P., nor sought an extension of time in which to file the brief, as required by Rule 26(b), Fed. R. App. P. On April 2, 1976, the government moved pursuant to Rule 31(c), Fed. R. App. P., to dismiss the appeal for failure to prosecute. After receiving petitioner's opposition to the motion, the court dismissed the appeal on May 14, 1976 (Pet. App. 7), and denied a petition for rehearing on June 3, 1976 (*ibid.*).

2. In view of petitioner's failure to file his brief within the time limits provided by the appellate rules or to request an extension of time to do so, despite the passage of more than three months from the time the brief was due, the court of appeals properly dismissed petitioner's appeal. See Rule 31(c), Fed. R. App. P.; *Jackson v. Hensley*, 484 F. 2d 992 (C.A. 5); *United States v. Lynch*, 419 F. 2d 386 (C.A. 4); *Hawke v. McKee*, 391 F. 2d 262 (C.A. 5). Contrary to petitioner's assertions (Pet. 3), his tardiness cannot be explained by his alleged inability to obtain a copy of the September 30, 1974, transcript. This transcript was not ordered by petitioner or designated by him pursuant to Rule 10(b), Fed. R. App. P. In addition, the transcript was transmitted to the court of appeals on April 11, 1975, and would presumably have been available to petitioner at that time if he had exercised normal diligence.

In any event, since the only issue decided by the district court was the legal question whether this action was barred by the statute of limitations, it is apparent that the eight-page transcript of oral argument on the government's summary judgment motion was unnecessary to the preparation of petitioner's brief and that the resolution of petitioner's appeal did not require access to any "complex scientific, technical, and legal information" (Pet. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.